Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-4372-99
BJLaterman

date:

to: Chief, Appeals Division, New England District
Attn: Bob Donovan

from: District Counsel, New England District, Boston

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subject: [redacted]
Forms 872
Taxable Years [redacted] through [redacted]

This is in response to your request that we provide advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years [redacted] through [redacted].

We have reviewed all the documents you have provided and the additional information submitted on August 9, 1999. [redacted] is a Delaware corporation organized in [redacted] as an [redacted] holding company. It was the parent corporation of an affiliated group of corporations which filed a consolidated return for each of the above-mentioned taxable years. [redacted] is also a Delaware corporation and the parent holding company for a group of [redacted] companies.

[redacted] was acquired by [redacted] in a tax-free reorganization on [redacted]. Pursuant to the Agreement and Plan of Merger dated as of [redacted], as amended as of [redacted] [redacted] was merged with and into [redacted] with [redacted] as the surviving corporation renamed [redacted]. After the merger the former [redacted] shareholders owned approximately [redacted]% of the combined company. The merger was upon the terms and subject to the conditions set forth in the Merger Agreement and in accordance with Delaware law. The Merger Agreement provided that [redacted], as the Surviving Corporation, shall succeed to and assume all the rights and obligations of [redacted] in accordance with the Delaware General Corporation Law.

On [redacted], Appeals being unaware of the pending merger, solicited consents from [redacted] to extend the statutes for the taxable years involved herein. On [redacted], these consents were signed by [redacted]'s Vice-President and Tax Director. These consents were not received by Appeals until [redacted] and were executed on behalf of the Commissioner on said date.

You have inquired us to the validity of these consents that were executed on behalf of [redacted] prior to the merger and on behalf of the Commissioner subsequent to the merger.

Subsequent to being informed of the merger, Appeals solicited consents from [redacted] as successor in interest to [redacted] Transferee Forms 977 and 2045 were also solicited from [redacted] as transferee of [redacted] You have also inquired as to the validity of these forms and as to the proper entity from whom to solicit Forms 870-AD (Offer to Waive Restrictions on Assessment and Collection of Tax Deficiency and to Accept Overassessment) and 2297 (Waiver of Statutory Notification of Claim Disallowance) for the years involved herein.

The extensions solicited from [redacted] prior to the merger should not be relied upon to extend the statute since reliance upon them may pose litigation hazards. Under Delaware law a corporation ceases to exist for all purposes upon merger into another corporation. See Beals v. Washington International, Inc., 386 A.2d 1156 (Del. Ch. 1978). In Malone & Hyde, Inc. v. Commissioner, T.C. Memo. 1992-661, the Tax Court concluded that since on merger a Delaware corporation's existence ceases, the authority to sign consents on its behalf ceases on the date of the merger. Therefore, it was held that consents executed on behalf of a merged corporation after the merger, pursuant to a power of attorney, were invalid. Rohde v. United States, 415 F.2d 695 (9th Cir. 1969) holds that for a waiver to be effective it must be signed by both parties and that since the waiver was not signed by the Commissioner prior to the expiration of the statute it did not extend the statute of limitations even though it had been signed on behalf of the corporation prior to the expiration of the statute. At the time Appeals received the waiver for signature, the signatory's authority had lapsed since [redacted] had merged out of existence. While the signatory had authority at the time he signed, in view of this case law, there are litigating hazards in relying upon the validity of a document which we know is signed by an individual who no longer has the authority to act on behalf of the taxpayer. Therefore, we concur in your decision to secure new consents for the consolidated group in order to cure any defects which may exist. It is noted, however, that the validity of the questionable Form 872 is a position the Service may want to defend in the event the statute has already expired prior to the discovery of this problem.

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters related to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Treas. Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect to the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Temp. Reg. § 1.1502-77T provides exceptions to the general rule. Temp. Reg. § 1.1502-77T provides for alternative agents in certain circumstances and applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Therefore, the regulation is applicable in this case. Temp. Reg. § 1.1502-77T provides that a waiver of the statute of limitations with respect to the consolidated group given by any one or more corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group.

Subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the common parent, [redacted] was merged in [redacted] on [redacted] and is no longer in existence. Therefore, this paragraph does not apply.

Subparagraph (a)(4)(ii) lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. § 381(a) applies. I.R.C. § 381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which I.R.C. § 361 (relating to non recognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F) or (G) of I.R.C. § 368(a)(1). On [redacted] merged into [redacted] with [redacted] surviving. If the merger is an "A" reorganization, I.R.C. § 381 will apply to the merger. If so, pursuant to Temp. Reg. § 1.1502-77T(4)(ii), [redacted] now known as [redacted] would be an alternative agent for the consolidated group for the tax years [redacted] through [redacted].

Any waiver given by [redacted] with respect to those pre-merger years of the [redacted] consolidated group would be deemed to be given by the agent of the group. We know that it was intended that the merger qualify as a reorganization under I.R.C. § 368(a). However, we do not know whether the requirements of I.R.C. § 368(a)(1)(A) have been met. Accordingly, we do not believe it would be in the best interests of the Service to rely upon this subparagraph in this case.

Subparagraph (a)(4)(iii) of Temp. Reg. § 1.1502-77T lists as an alternative agent the agent designated by the group under Treas. Reg. 1.1502-77(d). Treas. Reg. § 1.1502-77(d) provides that if the common parent corporation dissolves, the common parent and/or the remaining members of the consolidated group may designate another member of the group to act as agent, subject to the approval of the District Director. In this case, we assume that the common parent and/or remaining members of the [redacted] consolidated group did not designate another member of the group to act as agent. Accordingly, subparagraph (a)(4)(iii) does not apply.

Subparagraph (a)(4)(iv) of Temp. Reg. § 1.1502-77T lists as an alternative agent, the common parent of the group at the time the waiver is given if the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3). In this case, there is no "F" reorganization or downstream transfer as described in Treas. Reg. § 1.1502-75(d)(2). Therefore, we will only consider whether Treas. Reg. § 1.1502-75(d)(3) applies in this case.

Treas. Reg. § 1.1502-75(d)(3)(i) provides that if a corporation (the first corporation) or any member of a group of which the first corporation is the common parent acquires the stock of another corporation (the second corporation) and as a result the second corporation becomes a member of a group of which the first corporation is the common parent, or substantially all the assets of the second corporation, and the stockholders (immediately before the acquisition) of the second corporation, as a result of owning stock of the second corporation, own (immediately after the acquisition) more than 50 percent of the fair market value of the outstanding stock of the first corporation, then any group of which the first corporation was the common parent immediately before the acquisition shall cease to exist as of the date of acquisition, and any group of which the second corporation was the common parent immediately before the acquisition shall be treated as remaining in existence, with the first corporation becoming the common parent of the group.

In applying the 50 percent ownership test, the question is whether the shareholders of [redacted] (immediately before the acquisition), as a result of owning stock in [redacted] own (immediately after acquisition) more that 50 percent of the fair market value of the outstanding stock of [redacted] now known as [redacted]. If this is the case and the transaction in this case was pursuant to a plan of acquisition of the stock or assets of [redacted] then the transactions would constitute a reverse acquisition. The [redacted] consolidated group would be treated as remaining in existence, with [redacted] now known as [redacted], becoming the common parent of that group. If the transaction constituted a reverse acquisition, then pursuant to Temp. Reg. § 1.1502-77T(a)(4)(iv), [redacted] would be the alternative agent for the [redacted] consolidated group for the tax years [redacted] through [redacted] and any waiver given by [redacted] with respect to the pre-merger tax years of the [redacted] consolidated group would be deemed to be given by the agent of the group.

In this case, the shareholders of [redacted] received approximately [redacted]% of the combined company as the result of the merger. Therefore, the transaction constitutes a reverse acquisition. Accordingly, subparagraph (iv) does apply and [redacted] is the alternate agent for the [redacted] consolidated group for the taxable years [redacted] through [redacted].

Both [redacted] and [redacted], formerly [redacted] are Delaware corporations. In this case since the merger of [redacted] and [redacted] was effected under Delaware law, [redacted] is primarily liable for [redacted]s debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988). Section 259 of the Delaware General Corporation Law provides in part,

> (a) When any merger or consolidation shall become effective under this chapter, ... all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and any be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

DEL. CODE ANN. tit. 8, § 259 (1991).

In addition to being primarily liable for the debts of [redacted] under state law, [redacted] is also primarily liable under the terms of the Merger Agreement. Accordingly, [redacted] is a successor in interest by merger to [redacted].

Based on the foregoing discussion, we recommend that you obtain a Form 872 from [redacted] both as alternate agent and as successor in interest to [redacted] The Caption should read [redacted] (EIN) formerly known as [redacted] (EIN) successor in interest by merger to [redacted] (EIN) and alternate agent for the [redacted] consolidated group. On the bottom of the form, you should add the following: *This relates to the joint and several liability for the tax of the [redacted] consolidated group for its taxable years [redacted] through [redacted].

This Form should be signed by an authorized officer or director of [redacted]. Rev. Rul. 83-41, 1983 C.B. 399, clarified and amplified by, Rev. Rul. 84-165, 1984-2 C.B. 305.

In addition, under I.R.C. § 6901, [redacted] is a transferee at law of [redacted] because [redacted] received the assets of [redacted] when [redacted] merged into [redacted]. A determination against the surviving corporation for tax due by the merged corporation for a period prior to the merger is not generally handled as a transferee case, rather it should generally be handled by asserting primary liability against the surviving corporation. There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM (35)(10)61. Therefore, it is preferable to assert primary instead of transferee liability against the surviving corporation, [redacted], since the statutory period for assessing a deficiency has not expired under primary liability. The transferee liability approach should be reserved for the situation where time for asserting primary liability has expired.

With regard to securing Forms 870-AD and 2297 for the years involved herein, under the holding of Southern Pacific Company v. Commissioner, 84 T.C. 395 (1985), the agreements should be secured from [redacted]. In that case, it was determined that where there is a reverse acquisition, the common parent of one acquiring group is treated as the common parent of the acquired group with respect to all matters arising in connection with returns filed by the former common parent agent of the acquired group for taxable years that predate the acquisition. Therefore, in this case since there was a reverse acquisition, [redacted] formerly [redacted] the common parent of the acquiring group, is treated as the common parent of the [redacted] consolidated group for all matters involving the taxable years [redacted] through [redacted]. See

Treas. Reg. § 1502-75(d)(3).

If we can be of any further assistance, the undersigned can be reached at (617) 565-7838.

BARRY J. LATERMAN
Special Litigation Assistant